

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CARLOS P. VILLA,

Plaintiff, No. CIV S-03-1737 PAN (EFB)<sup>1</sup>

vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,<sup>2</sup>

ORDER

Defendant.

15 \_\_\_\_\_ /  
16 This case was administratively closed on December 15, 2003, pursuant to the previously  
17 assigned magistrate judge's approval of a stipulation and proposed order remanding the case to  
18 the Commissioner pursuant to sentence six of 42 U.S.C. § 405(g). The remand was pursuant to a  
19 stipulation of the parties that was reached once it became apparent that the defendant's Appeals  
20 Council could not locate plaintiff's claim file, which contained the recording of the hearing  
21 before the administrative law judge and his decision denying plaintiff disability benefits under

22 \_\_\_\_\_  
23 <sup>1</sup> Due to the retirement of Magistrate Judge Peter A. Nowinski, the Clerk is directed to  
24 reassigned this case to the undersigned, and to reopen it for disposition of defendant's motion.

25 <sup>2</sup> On February 12, 2007, Michael J. Astrue was sworn in as Commissioner of Social  
26 Security, replacing Jo Anne B. Barnhart, the original defendant herein. Pursuant to 42 U.S.C.  
§ 405(g) and Fed. R. Civ. P. 25(d)(1), Michael J. Astrue is substituted as the defendant in this  
action.

1 Titles II and XVI of the Social Security Act. The remand order directed the Appeals Council to  
2 reconstruct the evidentiary record on remand. The files were eventually located and thereafter it  
3 came to the Commissioner's attention that plaintiff's complaint had been untimely filed.  
4 Accordingly, the Commissioner returned to this court and filed a motion to dismiss or, in the  
5 alternative, for summary judgment.<sup>3</sup> Notwithstanding the service of the motion, *see* Certificate  
6 of Service by Mail (docket no. 10-6), plaintiff, who is proceeding in this action *in propria*  
7 *persona*, failed to oppose the motion.

8 Upon review of the motion, it appears that the Commissioner's argument is well-taken.  
9 The administrative law judge issued an unfavorable decision regarding plaintiff's application for  
10 disability benefits on November 17, 2000. *See* Declaration of Paul D. Gould ("Gould Decl."),  
11 ¶ 3a. Plaintiff requested a review of the decision, and on September 13, 2002, the Appeals  
12 Counsel sent him, by mail, a notice of its decision denying his request. *Id.*; Exh. 2 thereto. That  
13 notice advised plaintiff that he had sixty days from the date of receipt of the notice in which to  
14 commence a civil action. *Id.* The notice further advised plaintiff that he could request an  
15 extension of time to commence the action, provided he clearly set forth a good reason for such  
16 extension. *Id.* Plaintiff did not file a request for an extension and did not commence this action  
17 until August 12, 2003 – more than two hundred days after the sixty-day deadline.<sup>4</sup> *See* Gould  
18 Decl., ¶ 3b.

19 While the sixty-day statute of limitations is not jurisdictional, and in some cases may be  
20 equitably tolled, *see Vernon v. Heckler*, 811 F.2d 1274, 1276 (9th Cir. 1987), plaintiff has failed  
21 to oppose defendant's motion and has not met his burden to establish a grounds for equitable

---

22  
23       <sup>3</sup> In the case of a sentence six remand, the district court retains jurisdiction over the action  
24 pending further development and consideration by the Commissioner. *See Van v. Barnhart*, 483  
25 F.3d 600, 610 n.5 (9th Cir. 2007). Accordingly, the court retains jurisdiction to rule upon  
26 defendant's motion.

27       <sup>4</sup> Unless otherwise shown, a claimant is presumed to have received the Appeals Council  
28 denial notice five days after the date on the notice, which in this case was September 13, 2002.  
29 20 C.F.R. §§ 404.901, 416.1401.

1 tolling. *See id.*, at 1277-78 (burden is on plaintiff to establish equitable tolling of the statute of  
2 limitations). Under the local rules, an opposition must be filed fourteen days preceding the  
3 noticed hearing date. E.D. Cal. L.R. 78-230(c). Here, however, while defendant's motion was  
4 served on plaintiff, it was never noticed for hearing. In light of this, together with plaintiff's *pro*  
5 *se* status and the delay in transferring this case to the undersigned, the court will provide plaintiff  
6 one final opportunity to file an opposition to defendant's motion. Plaintiff shall have thirty days  
7 from the date of service to file an opposition to defendant's motion. Failure to file a timely  
8 opposition will be deemed a statement of non-opposition, and shall result in an order granting  
9 defendant's motion. *See* E.D. Cal. L.R. 11-110, 83-183(a). If plaintiff files an opposition,  
10 plaintiff may serve a reply thereto, if any, five court days thereafter, upon which filing the matter  
11 will be deemed submitted. E.D. Cal. L.R. 78-230(h).

12 This order will be served on plaintiff's address of record. *See* E.D. Cal. L.R. 83-182(f)  
13 and 83-183(b).

14 SO ORDERED.

15 DATED: July 11, 2008.



16 EDMUND F. BRENNAN  
17 UNITED STATES MAGISTRATE JUDGE  
18  
19  
20  
21  
22  
23  
24  
25  
26